Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1377

CHARLES ANDERSON, Warden,
State Prison of Southern Michigan at Jackson,

Petitioner,

v

GLENN CHARLES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

Petitioner Charles Anderson, Warden of the State Prison of Southern Michigan at Jackson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 4, 1979.

OPINIONS BELOW

Respondent Charles was convicted by a jury in the Washtenaw County Michigan Circuit Court of first degree murder in 1972 and received the mandatory sentence of life imprisonment. The conviction was affirmed by the Michigan Court of Appeals (see App, p 1a), *People* v *Charles*, 58 Mich App 371, 227 NW2d 348 (1975), lv to appeal den without opinion

397 Mich 815 (1976). In this federal habeas corpus proceeding, Respondent Charles' claims were rejected in a magistrate's Recommendation and Report dated November 16, 1978 (App, p 16a) which was accepted and entered as the findings and conclusions of the United States District Court for the Eastern District of Michigan in a Judgment (App, p 26a) and Order of Dismissal (App, p 27a) dated December 28, 1978. On appeal, a majority of the United States Court of Appeals for the Sixth Circuit entered an opinion and judgment (App, p 28a) *Charles* v *Anderson, Warden*, 610 F2d 417 (CA 6, 1979) which concluded that Respondent Charles' constitutional rights had been violated at his state court trial and ordered the case remanded to the District Court with directions to issue a writ of habeas corpus unless Charles is tried again in the state court within a reasonable time. A timely motion for rehearing with a request for rehearing en banc was denied by the Sixth Circuit's order entered January 22, 1980 (App, p 45a) and on February 6, 1980 the Sixth Circuit entered its order staying the mandate for 30 days pending application to this Court for writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 4, 1979 and its order denying the petition for rehearing was entered on January 22, 1980. This Petition for Certiorari is filed within 90 days of that date. Pursuant to a timely motion filed in the Court of Appeals, an order staying the mandate of the Court of Appeals pending application to this Court for writ of certiorari was entered on February 6, 1980 and this petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. May a state court defendant who has made a post-arrest statement inconsistent with his exculpatory trial testimony be cross-examined about the fact that the post-arrest statement was not the same as the exculpatory story told at trial?

2. Assuming, *arguendo*, that constitutional error occurred in the cross-examination, was it harmless beyond a reasonable doubt?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const, Am XIV, § 1 (in pertinent part):

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This is a habeas corpus case in which the jurisdiction of the District Court was invoked under 28 USC § 2254. Respondent Charles alleged numerous infirmities in the state court trial which resulted in his conviction of murder, but the District Court denied relief. The Court of Appeals, whose jurisdiction was based upon 28 USC § 1291, reversed in a divided opinion and remanded the case to the District Court with directions to issue a writ of habeas corpus unless Respondent is tried again in the state court within a reasonable time. The Court of Appeals concluded that although Charles was properly cross-examined about a prior inconsistent statement, the prosecutor violated Charles' constitutional rights during cross examination

about Charles' failure to tell the arresting officers the exculpatory story he later told at trial. The Court also concluded that the error was not harmless beyond a reasonable doubt.

In July, 1971, Theodore Ziefle was strangled to death by an electrical cord in his home in Ann Arbor, Michigan. His head had been badly battered and the body was found in a pool of blood. Much of the house was in disarray and several items of personal property as well as decedent's automobile were missing. Mr. Ziefle had been last seen alive on the evening of July 24, 1971 when he entered his house in the company of another man wearing a black T-shirt. On July 30, 1971, four days after Mr. Ziefle's body had been discovered, two Grand Rapids police officers noticed an automobile conforming to the description sent out by Ann Arbor officials. They were able to apprehend the driver, Respondent Glenn Charles, after a chase by automobile and on foot.

At trial, a prosecution witness testified (Trial tr 175-186) that she met Respondent Charles on the evening of July 25 in Grand Rapids. He was wearing a black T-shirt at the time and he told her that he had escaped from the State Prison of Southern Michigan at Jackson and had hitchhiked a ride with a "faggot" whom he murdered and whose car he stole. He further stated that he had money that he had stolen from the victim, as well as personal belongings such as a camera, rings, a suitcase and a wallet. Charles further stated that his hands were deadly weapons and he discussed the time it took to strangle a person. This testimony was corroborated by several other prosecution witnesses.

Robert LeVanseler, a detective of the Ann Arbor Police Department, traveled to Grand Rapids and interviewed Charles on the morning of July 30, 1971 after reading him the *Miranda* warnings. Charles told Detective LeVanseler that he had stolen the deceased's automobile from the vicinity of Washte-

naw and Hill Streets in the City of Ann Arbor, a location which is about two miles from the courthouse and bus station. (Tr 237-239).

Respondent Charles testified in his own defense. He testified that he had escaped from the State Prison at Jackson on the morning of July 22, 1971, had hitchhiked to Ann Arbor and that he had spent most of his time walking around a street festival in Ann Arbor. He claimed that he had stolen the deceased's car during the night of July 25, 1971 from a tire company adjoining the bus station in Ann Arbor. He claimed that the items of personal property had been found in the trunk of the car. During cross-examination by the prosecutor, the following colloquy occurred (Trial tr 302-304):

"Q. Now, this Kelly's Tire Company, that's right next to the bus station, isn't it?

"A. That's correct.

"Q. And, the bus station and Kelly's Tire are right next to Washtenaw County Jail are they not?

"A. They are.

"Q. And, when you're standing in the Washtenaw County Jail looking out the window you can look right out and see the bus station and Kelly's Tire, can you not?

"A. That's correct.

"Q. So, you've had plenty of opportunity from—well, first you spent some time in the Washtenaw County Jail, haven't you?

"A. Quite a bit.

"Q. And, you have had plenty of opportunity to look out that window and see the bus station and Kelly's tire?

"A. That's right.

"Q. And, you've seen cars being parked there, isn't that right?

"A. That's correct.

"Q. Is this where you got the idea to come up with the story that you took a car from that location?

"A. No, the reason I came up with that is because it's the truth.

"Q. It's the truth?

"A. That's right.

"Q. Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?

"A. I wasn't charged with auto theft, I was charged with murder.

"Q. Didn't you think at the time you were arrested that possibly the car would have something to do with the charge of murder?

"A. When I tried to talk to my attorney they wouldn't let me see him and after that he just said to keep quiet.

"Q. This is a rather recent fabrication of yours isn't it not?

"A. No, it isn't.

"Q. Well, you told Detective LeVanseler back when you were first arrested, you stole the car back on Washtenaw and Hill Street?

"A. Never spoke with Detective LeVanseler.

"Q. Never did?

"A. Right, except when Detective Hall and Price were there and then it was on tape."

Charles was convicted of first degree murder, sentenced to life imprisonment and the conviction was upheld in the Michigan appellate courts. The United States District Court denied habeas corpus relief, but the Sixth Circuit Court of Appeals reversed, App, p 34a:

> "The question we must address is whether a defendant who has made a post-arrest statement inconsistent with his exculpatory trial testimony may be cross-examined not only about his prior inconsistent statement but also about his post-arrest failure to tell the arresting officers the exculpatory story he told at his trial. For the reasons hereinafter set forth, we hold that he may not, and, accordingly, reverse."

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION IS BASED UPON A SERIOUS MISAPPREHENSION OF FACT, IS BASED UPON A MISAPPLICATION OF DOYLE v OHIO, 426 US 610 (1976) AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH MUST BE SETTLED BY THIS COURT.

In *Doyle* v *Ohio*, 426 US 610 (1976) this Court held that when a defendant has remained silent after receiving *Miranda* warnings at the time of his arrest such silence is "insolubly ambiguous" and therefore a state prosecutor may not, con-

sistent with due process, seek to impeach an exculpatory story told for the first time at trial by cross-examining the defendant about his post-arrest silence. *Doyle* dealt only with cross-examination as to post-arrest silence and did not invlove any question of cross-examination about prior inconsistent statements although footnote 11 of the opinion, 426 US at 619 indicates that the prosecution could use the fact of post-arrest silence to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version on arrest since in that situation the fact of earlier silence would be used to challenge the defendant's testimony as to his behavior following arrest. Nothing in the decision or rationale of *Doyle* operates to preclude full cross-examination about prior inconsistent statements and the holding of the Court of Appeals to the contrary presents an important, recurring question of federal law which must be settled by this Court.

It must first be noted that although Charles was initially arrested by Grand Rapids City Police officers there is nothing in this record to indicate that any questioning took place at that time. The entire cross-examination which has been challenged in this habeas corpus proceeding relates to questioning conducted by Ann Arbor Detective LeVanseler. This is apparent when the entire challenged colloquy is viewed in proper context because although the prosecutor used the phrase "at the time you were arrested" it is apparent that he is talking about an arrest made by the Ann Arbor detective rather than the Grand Rapids officials:

> "Well, you told Detective LeVanseler *back when you were first arrested,* you stole the car back on Washtenaw and Hill Street?" (emphasis added)

The Court of Appeals admits that cross-examination about the prior inconsistent statement was constitutionally permis-

sible (App, p 37a), but went on to hold that the post-arrest failure to tell the same story he told at trial is insolubly ambiguous and therefore the cross-examination violated due process (App, p 38a). The State of Michigan contends that the Court of Appeals decision is based upon a misapprehension of fact because when the entire cross-examination (rather than the few sentences quoted out of context in the Court of Appeals opinion, App, p 37a-38a) is viewed in context it is readily apparent that the prosecutor's questions related only to the inconsistency between Charles' post-arrest statement and his trial testimony and the cross-examination did not relate to a mere post-arrest failure to tell the same story told at trial. The State also contends that the Court of Appeals opinion is based upon a misapplication of *Doyle* v *Ohio*, because when the entire exchange is viewed in context, it is apparent that at the time of which the prosecutor was speaking (the arrest and interrogation by the Ann Arbor detective) Charles did not remain silent. Instead he made an affirmative statement which was significantly inconsistent with his later trial testimony. This affirmative statement cannot be deemed to be insolubly ambiguous in the same sense as the silence in *Doyle*. Rather, the inconsistency opened the door to permissible prosecutorial cross-examination and impeachment.

When viewed in context, it is apparent that the prosecutor's cross-examination was aimed only at exploring the inconsistency between Charles' post-arrest statement and his later trial testimony. In order to explore the inconsistency, the prosecutor obtained Charles' admission that during the time spent in the Washtenaw County Jail he had seen cars being parked behind the tire company and then asked if this was where Charles "got the idea to come up with the story that you took a car from that location?" Charles then asserted that his trial testimony was the truth, thus necessarily implying that the inconsistent post-arrest statement was false. Under these circumstances, the prosecutor's next question ("Don't

you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?") can only be viewed as further exploration of the inconsistency and not as an attempt to impeach by post-arrest silence. This interpretation of the exchange is buttressed by the fact that the prosecutor immediately inquired whether the trial testimony was "a rather recent fabrication" and then made explicit reference to the inconsistent post-arrest statement. The record of this trial clearly indicates that Charles did more than merely fail to tell arresting officers the same story he told at trial. Rather, he affirmatively offered an explanation which was inconsistent with his later trial testimony. Such conduct is more than mere silence as in *Doyle;* it is an affirmative inconsistent act which may permissibly be subject to cross-examination at trial. Such inconsistent statements do not suffer from the inherent insoluble ambiguity of silence such as in *Doyle* because the inconsistency has evidentiary value since it serves to impeach a defendant's credibility. Although, as the Court of Appeals majority opinion states, there may be more than one explanation for inconsistent statements, a defendant under these circumstances has the opportunity to offer an explanation and there is nothing constitutionally impermissible about permitting cross-examination about the inconsistency.

The majority opinion of the Court of Appeals, holds, in effect, that where a defendant gives story A following his arrest and story B at trial, the prosecutor may cross-examine him about the inconsistency, but may not ask why he failed to tell story B and instead told story A following his arrest. The State of Michigan submits that such a distinction, if it exists, is highly artificial, is virtually incapable of application in the heat of cross-examination of a hostile and evasive witness and is unnecessary in order to insure a fair trial for a criminal defendant. If a defendant has in fact remained silent following his arrest, his silence may be mere reliance on the

Miranda warnings and there is justification for prohibiting cross-examination about the silence. On the other hand, where a defendant has foregone his right to remain silent and has affirmatively offered a post-arrest statement which is inconsistent with subsequent trial testimony, there is no principled basis for prohibiting complete cross-examination about the inconsistency.

Assuming, *arguendo*, that the prosecutor's cross-examination amounted to a constitutional violation, the State of Michigan submits that under the facts of this case any error was harmless beyond a reasonable doubt. The harmless error rule was enunciated in *Chapman* v *California*, 386 US 18 (1967) in which this Court said that harmless error analysis requires a determination whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. It must be recalled that the alleged constitutional error in this cross-examination consists only of one or two sentences which occurred during a cross-examination comprising almost 100 pages of trial transcript. Evidence was adduced against Charles placing him in Ann Arbor on the day of the murder and in possession of the murder victim's automobile and numerous personal belongings which had been taken from the victim's residence. Prosecution witnesses testified that when Charles first arrived in Grand Rapids he was wearing clothing similar to that worn by the person last seen with the deceased and they further testified that Charles had boasted about his hands as deadly weapons, had been knowledgeable about strangulation, and had admitted robbing, hitting and murdering a man in Ann Arbor. Upon review of the entire trial record, Petitioner submits that it is clear that any error in cross-examination was harmless beyond a reasonable doubt.

Although the State contends that no violation of the *Doyle* rationale occurred or, alternatively, that any such error was harmless beyond a reasonable doubt, there is yet another reason why this Court should review and reverse the Court of Appeals. In several cases including *Linkletter* v *Walker*, 381 US 618 (1965) and *Stovall* v *Denno*, 388 US 293 (1967) this Court has said that constitutional rules of criminal procedure may be given prospective effect only where necessary after giving consideration to (a) the purpose to be served by the new standard, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. In the instant case, the crime was committed, the trial was held and the conviction affirmed by the Michigan Court of Appeals before this Court issued its *Doyle* decision on June 26, 1976. Under these circumstances, the State submits that this case presents an important federal question as to whether *Doyle* should be given retroactive application to Respondent Charles.

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

The Court of Appeals in the present case held that the prosecutor's questions dealt with two separate issues, one permissible (cross-examination about the prior inconsistent statement) and the other impermissible (cross-examination about Charles' failure to tell arresting officers the same story he told the jury). The State of Michigan disagrees with the Court of Appeals distinction and submits that the record indicates only proper cross-examination about prior inconsistent statement, but if the Court of Appeals analysis is correct, it is apparent that its decision is in direct conflict with at least one other decision rendered by a different Court of Appeals.

In *United States* v *Mireles*, 570 F2d 1287 (CA 5, 1978) the defendant was driving a truck when he was stopped by Border Patrol agents. Inspection of the back of the truck led to the discovery of 1,850 pounds of marijuana. The Border Patrol agent testified that defendant Mireles was placed under arrest, given the *Miranda* warnings and acknowledged that he fully understood his rights. The agent testified that defendant stated that the marijuana was not his, that he had not known of its presence and that he had merely borrowed the truck from his uncle to move his own furniture to his new residence. Defendant Mireles testified at trial that he had been paid by a man named Rivas to move Rivas' furniture. Thus, defendant's trial version of the incident contradicted the Border Patrol agent's testimony that immediately after the arrest defendant had stated that the furniture in the rear of the truck belonged to him. On cross-examination, the prosecutor asked the defendant whether he had told the Border Patrol agents about the

man named Rivas and the defendant admitted that he had not. In his closing argument, the prosecutor alluded to the defendant's failure to tell the arresting officers that same story he later told at trial. 570 F2d at 1292, fn 8. Defendant was convicted of possession of marijuana with intent to distribute and on appeal alleged that there had been a violation of *Doyle* v *Ohio, supra,* 426 US 610 (1976).

The Fifth Circuit recognized that a crucial issue in the case was the inconsistency between the defendant's exculpatory story told at trial and the Border Patrol agent's testimony regarding defendant's earlier inconsistent statements. The court concluded that despite the defendant's claims, his silence was not at issue because the government was concerned with inconsistencies between his two stories. The court further noted that the defendant's failure to mention Mr. Rivas either before or after his arrest bolstered the agent's testimony that defendant claimed that the furniture was his and that the truck was borrowed from his uncle. The conclusion of the *Mireles* court, 570 F2d at 1293 is directly inconsistent with the conclusion of the Court of Appeals in the instant case:

> "Therefore, the prosecutor's questions and argument were not an impeachment by silence, as in *Doyle,* but merely an effort to impeach by prior statements that were inconsistent with defendant's testimony at trial. There is no 'insoluble ambiguity' of silence as noted in *Doyle,* since defendant Mireles waived his right to remain silent, and denied knowledge of the presence of the contraband after his arrest. *Doyle's* protection of the right to remain silent does not apply to cross-examination and argument concerning a defendant's exculpatory explanation given after the *Miranda* warnings."

In *United States* v *Agee,* 597 F2d 350 (CA 3, 1979) cert den 99 S Ct 2889 (1979) the defendant's conviction of possession of

heroin was upheld on appeal despite a claim that the prosecutor's cross-examination had violated *Doyle* v *Ohio, supra.* The defendant testified that while driving a taxicab he was stopped for traffic violations and as the policeman approached his vehicle a passenger in the cab threw a pack of silver foil (later determined to contain heroin) to defendant and that defendant picked it up. He testified that he was confused and started to throw the bag back to the passenger and that he didn't know whether to throw it out the window or what to do with it so he attempted to hide it in a console and under the seat of the car. Defendant then exited the car and approached the police officers and in reply to a question from one of the officers, defendant stated that he did not have any dope on him. He testified that his purpose in approaching the policemen was to keep them from coming up to his car and that what was in his mind was to tell his passenger to take his stuff and get out of the car. The prosecutor then asked Agee whether it wasn't in his mind to say to the police, "that man in my car has dope. Arrest him" and defendant replied in the negative. The Third Circuit rejected the claim based on *Doyle* v *Ohio* because the testimony revealed that the defendant had made statements to the police which he knew to be false and which he hoped would prevent them from discovering an ongoing crime. Under such circumstances the court concluded the defendant had not remained silent. The court held that *Doyle* "can have no application to a case in which the defendant did *not* exercise his right to remain silent." 597 F2d at 395 (emphasis in original). The following summation from *Agee,* 597 F2d at 356 demonstrates its conflict with the Court of Appeals holding in the instant case:

> "Here, as we have indicated, the record reveals unequivocally that Agee did not exercise his right to remain silent regarding the facts of the incident. Nor did the prosecutor suggest that he did. Instead, the thrust of her questions and her argument was that Agee made a delib-

choice to lie to the police in order to conceal from them an ongoing crime. If we were to hold that a prosecutor may not question or refer to a defendant's statements and conduct which were designed to deceive the police regarding the commission of a crime, we would be extending the holding of *Doyle* far beyond its rationale. This we decline to do."

Other cases which demonstrate a conflict, at least in principle, with the decision of the Court of Appeals include *Twyman* v *State of Oklahoma,* 560 F2d 422 (CA 10, 1977) cert den 434 US 1071 in which the defendant turned himself in to FBI agents and after receiving the *Miranda* warnings gave a detailed account of his recent activities including his association with the murder victim. The defendant also testified at trial, where he again gave a purportedly full and detailed accounting of his activities, and on cross-examination he was questioned regarding the fact that he waited until trial to furnish information regarding the murder weapon. The court held that because he had made a statement, he opened himself up to full cross-examination the same as any other witness and there was no constitutional violation when he was cross-examined about his omission in the post-arrest statement. Similarly in *United States* v *Mitchell,* 558 F2d 1332 (CA 8, 1977) the defendant was convicted of transporting a stolen motor vehicle in interstate commerce and concealing the vehicle. The day after his arrest and after receiving *Miranda* warnings, defendant submitted to questioning by the police and stated that he was going to St. Louis to attend the funeral of a homicide victim named Jesse Owens. When confronted with the information that there had been no homicide victim by that name, defendant remained silent and later objected to testimony claiming a violation of *Doyle* v *Ohio, supra.* The Eighth Circuit noted, 558 F2d at 1335 that false exculpatory statements are admissible at trial as tending to indicate guilt and that his silence when confronted with the apparent falsity of

his post-arrest statement serves to support the inference that he had lied to cover up that fact that he had been fleeing in a stolen car. The court found no constitutional error.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

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[58 Mich App 371]

PEOPLE v CHARLES

[58 Mich App 373]

Appeal from Washtenaw, William F. Ager, Jr., J. Submitted Division 2 January 7, 1975, at Lansing. (Docket No. 18248.) Decided February 10, 1975.

Glenn G. Charles was convicted of first-degree murder. Defendant appeals. Affirmed.

[58 Mich App 374]

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, *William F. Delhey*, Prosecuting Attorney, and *John J. Hensel*, First Assistant Prosecuting Attorney, for the people.

Roger L. Wotila, Assistant State Appellate Defender, for defendant.

Before: Danhof, P.J., and McGregor and Walsh, JJ.

Danhof, P.J. Defendant was convicted of first-degree murder, MCLA 750.316; MSA 28.548, and given the mandatory sentence of life imprisonment. One year later, his application for delayed appeal was granted. He raises numerous issues, the merits of which vary greatly, but none of which necessitate reversal.

On July 26, 1971 the body of Mr. Theodore Ziefle was discovered in the foyer of his home by his half brother and members of the Ann Arbor Police Department. The body, clad only in a pair of trousers, was found in the front hallway at the foot of the stairs leading to the second floor. Decedent's head

had been badly battered and he was lying on his back in a pool of blood. A lamp from which the electrical cord had been removed was found near the body, as were parts of a wooden clothes hanger. The electrical cord itself was wrapped and knotted around the decedent's neck.

The bedroom was in disarray, and a collection of silver coins totalling at least $100 in face value was missing from the closet. Five bank passbooks and an old style camera were also taken. The decedent's automobile, a Buick Skylark, was not in the garage.

Medical examination of the body disclosed that Mr. Ziefle had died on July 24 or 25, 1971. Death [58 Mich App 375] was caused by strangulation resulting from the knotting and twisting of the electrical cord around decedent's neck so tightly that it was bured in the layers of skin which were swollen and discolored. Clotted blood and mucus material filled the mouth and nasal passages, and the decedent's tongue was engorged and protruding. A bone located in the throat just above the voice box called the hyoide was fractured at three places. The body showed evidence of a severe beating including abrasions and contusions around the eyes and nose, and an area of thickening and swelling in the back of the head.

An alert to watch for Mr. Ziefle's 1965 Buick automobile was teletyped to the police agencies in Michigan. Mr. Ziefle's house was examined by technical experts who discovered blood of decedent's type in the bathroom sink, and hair samples matching his on the banister leading to the second floor. No unaccounted for latent fingerprints were found. Photographs of the entire area were taken, including the front porch where two newspapers were still lying.

On July 30, 1971 two Grand Rapids police officers on patrol noticed a 1965 Buick which conformed to the descrip-

tion sent out by the Ann Arbor police department. They were able to apprehend the driver, who was later identified as the defendant, after a chase by automobile and on foot. Two women were in the car with the defendant when he was arrested.

The women had come to know the defendant through a meeting in a Grand Rapids park. The defendant told a number of people in the park that he was driving a "hot car", and that its owner was dead. He went on to inform them that he murdered a man in Ann Arbor, took his car, and [58 Mich App 376] that the man was a sexual deviate. He explained how long it takes to strangle a person, boasting that his hands were deadly weapons, and listing the items, including old silver coins, that he had stolen. Some of the items given by the defendant to the women were later identified as having belonged to decedent.

Defendant testified that he was a prison escapee, and that on the night of July 24, 1971 he went to a movie in an Ann Arbor theater. Later that night, he stated that he discovered the decedent's automobile in a parking lot behind a tire store with the keys in the ignition. He took the car and went directly to Grand Rapids where he subsequently discovered the various possessions of the decedent in the trunk.

I

Near the midpoint in the trial, an unidentified member of the jury sent a note to the trial judge inquiring whether or not they could ask a question of two of the witnesses. The juror was interested in knowing the dates of the two newspapers found on the porch of the decedent's house. The question was to be directed to a police officer who took the photographs of the scene, or to decedent's brother who was with the police officers when the body was discovered. In

response to this inquiry, the trial court gave the following instruction to the jury:

"Again, as I told you yesterday, don't talk about the case with anyone, don't discuss it with each other until you've heard all the testimony. I might state this in answer to a question the jury can't ask questions. Some jurisdictions maybe they permit the jury to ask questions but we can't permit the jury to ask questions. If you have a question in your mind we can't help you [58 Mich App 377] under our system in Michigan. A jury is not permitted to ask questions. But if you don't hear anything of course then you stand up or shout or raise your hand, let us know about it if you don't hear something, but not to ask questions. Alright, tomorrow morning, 9:00, don't read the paper anything like that, that has anything to do with this case."

This instruction was erroneous. The propriety of permitting jurors to question witnesses was characterized by your Supreme Court in *People* v *Heard*, 388 Mich 182; 200 NW2d 73 (1972) as an issue of first impression in the State of Michigan. After analyzing the resolution of this issue in other jurisdictions, the Court decided the question for this State:

"We hold that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. The trial judge may permit such questioning if he wishes, and we hold that it was error for the judge to rule that under no circumstances might a juror ask any questions." *People* v *Heard*, *supra*, 388 Mich 188.

Although the error in the trial court's instruction is now manifest, it was not at all evident at the time of trial. The *Heard* case was decided on August 30, 1972. The advance sheets containing this opinion were mailed on or about October 3, 1972. Trial in the present case began on September 25, and

the complained of instruction was given to the jury by the learned trial judge on September 26, 1972. Thus, while technically there is no problem with retroactivity in that this case was tried after the date of the decision in *Heard*, the trial judge had no way of knowing that the instruction he gave was no longer an accurate statement of the law.

An analogous problem was presented to this [58 Mich App 378] Court in *People* v *Glover*, 47 Mich App 454; 209 NW2d 533 (1973). In that case, the prosecution's chief witness was a 16-year-old boy whose credibility defense counsel sought to impeach by use of his juvenile record. The trial court gave both parties 15 minutes to research the law on this point. Relying on what the trial court, defense counsel, and the prosecutor conceived to be the current state of the law, the trial court refused to permit the juvenile records to be used for impeachment purposes and instructed the jury not to consider any of the previously permitted testimony having to do with the witness's juvenile court record. On appeal, this Court discussed the practical difficulties inherent in a situation of this kind:

"The law at the time of defendant's trial clearly permitted the use of a juvenile record for the impeachment of a witness who, as here, was not himself a defendant. *People* v *Davies*, 34 Mich App 19; 190 NW2d 694 (1971); *People* v *Basemore*, 36 Mich App 256; 193 NW2d 335 (1971). *Davies* and *Basemore* were printed in the advance sheets approximately three months and two weeks respectively before the start of defendant's trial. These cases represented a shift of the law, and we do not deem either the prosecutor or the defense counsel negligent in failing to discover them within the 15 minutes allocated to research the impeachment question. However, the trial court was bound to follow the law nothwithstanding the fact that it was not called to the court's attention." *People* v *Glover*, *supra*, 47 Mich App 457, 458.

Concluding that the trial court erred, the opinion points out that no objection to the ruling and instruction was made at trial, and that review must be confined to ascertaining whether or not a miscarriage of justice has occurred. This is the standard generally applicable to issues raised for the first time on appeal without benefit of preser- [58 Mich App 379] vation by timely objection in the lower court, and to allegations of instructional error in particular. GCR 1963, 516.2, MCLA 769.26; MSA 28.1096; *People* v *Mitten*, 44 Mich App 64; 205 NW2d 47 (1972); *People* v *Bradley*, 54 Mich App 89; 220 NW2d 305 (1974); *People* v *Adams*, 48 Mich App 595; 210 NW2d 888 (1973). It has been held that, in the absence of a timely objection or request, this standard must be satisfied to invoke the rule in *Heard*. *People* v *Justice*, 50 Mich App 55; 212 NW2d 762 (1973), *lv den*, 391 Mich 792 (1974).

Understandably in the present case, no objection to the trial court's ruling and instruction was made. Therefore, we have closely examined the record in an effort to determine if this error has resulted in a miscarriage of justice necessitating reversal. We conclude that it has not.

The information concerning the newspapers on the porch which was requested from the two witnesses named in the note was later provided by two other prosecution witnesses. A police detective testified extensively with respect to the newspapers, establishing that the two papers found on the porch were the Ann Arbor News for Sunday, July 25, and Monday, July 26, 1971; while the papers for Friday, July 23 and Saturday, July 24 were found in the kitchen of decedent's house. Later in the trial, another detective confirmed the discovery of the newsapers on the front porch. Where a witness is erroneously prevented from answering a question, but the same information which would have been given is otherwise related to the jury, the error will not in itself require reversal.

People v *Berrier*, 48 Mich App 454; 210 NW2d 506 (1973), *lv den*, 390 Mich 813 (1973).

The information which might have been elicited from the witnesses had the jury been allowed to [58 Mich App 380] submit questions to them could very conceivably have been damaging to defendant's case. For example, the newspapers were of some probative value in establishing the time of Mr. Ziefle's death. Thus, defense counsel may have elected not to raise any objection to the trial court's ruling and instruction as a matter of trial tactics to prevent the jury from uncovering weaknesses in the defendant's case. *People* v *Burks*, 48 Mich App 484; 210 NW2d 495 (1973); *People* v *Carter*, 54 Mich App 69; 220 NW2d 330 (1974).

In *Heard*, defense counsel raised the issue of juror questioning of witnesses in his opening statement and pursued the issue throughout the lengthy discussion reproduced in the Supreme Court's opinion. *People* v *Heard, supra*, 388 Mich 184-186. Defense counsel intended to incorporate jury participation as a part of his trial strategy. There is absolutely no doubt that the question there was properly preserved for appellate consideration.

II

Defendant argues that the prosecutor elicited from him on cross-examination testimony which indicated that he had exercised his right to remain silent at the time of his arrest. This argument is not supported by the facts of the case. Before the defendant took the stand, Detective LeVanseler testified that the defendant had told him shortly after his arrest that he had taken decedent's car from the vicinity of Washtenaw and Hill Streets in the City of Ann Arbor. On direct examination, the defendant testified that he took the car from the parking lot of a tire store located next to the

county jail. The defendant's appellate counsel quotes a small passage from the trial transcript to [58 Mich App 381] support his claim that the prosecutor inquired concerning defendant's decision to exercise his right to remain silent. Consideration of a slightly greater portion of the transcript of the prosecutor's cross-examination of the defendant discloses that the prosecutor was not referring to the defendant's exercise of his right to remain silent; rather, he was asking the defendant why, if that version were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the street:

"Q. *(by the prosecuting attorney):* Now, this Kelly's Tire Company, that's right next to the bus station, isn't it?

"A. *(by defendant):* That's correct.

"Q. And, the bus station and Kelly's Tire are right next to the Washtenaw County Jail are they not?

"A. They are.

"Q. And, when you're standing in the Washtenaw County Jail looking out the window you can look right out and see the bus station and Kelly's Tire, can you not?

"A. That's correct.

"Q. So, you've had plenty of opportunity from — well, first you spent some time in the Washtenaw County Jail, haven't you?

"A. Quite a bit.

"Q. And, you have had plenty of opportunity to look out that window and see the bus station and Kelly's tire?

"A. That's right.

"Q. And, you've seen cars being parked there, isn't that right?

"A. That's correct.

"Q. Is this where you got the idea to come up with the story that you took a car from that location?

"A. No, the reason I came up with that is because it's the truth.

[58 Mich App 382] "Q. It's the truth?

"A. That's right.

"Q. Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?

"A. I wasn't charged with auto theft, I was charged with murder.

"Q. Didn't you think at the time you were arrested that possibly the car would have something to do with the charge of murder?

"A. When I tried to talk to my attorney they wouldn't let men see him and after that he just said to keep quiet.

"Q. This a rather recent fabrication of yours isn't it not?

"A. No, it isn't.

"Q. Well, you told Detective LeVanseler back when you were first arrested, you stole the car back on Washtenaw and Hill Street?

"A. Never spoke with Detective LeVanseler.

"Q. Never did?

"A. Right, except when Detective Hall and Price were there and then it was on tape."

Any reference to the defendant's communicativeness at the time of his arrest went to show the inconsistency between defendant's testimony at trial that he did not speak to Detective LeVanseler concerning the car, and his earlier statement to the detective that he took the car from the vicinity of Hill and Washtenaw Streets. cf. *People v Graham*, 386 Mich 452; 192 NW2d 255 (1971). The prosecutor's question was by no means an attempt to use defendant's silence as evidence of his guilt. The question was designed to elicit information from the defendant concerning a prior statement which was inconsistent with his testimony at trial. *People v Taylor*, 44 Mich App 640; 205 NW2d 884 (1973), *lv den*, 389 Mich 810 (1973). Furthermore, there is no reasonable possibility that the passing [58 Mich App 383] remark of the prosecutor could have contribuuted to the defendant's conviction. *People v Swan*, 56 Mich App 22; 223 NW2d 346 (1975).

III

Defendant contends that the information filed in this case was defective in that it did not adequately differentiate between first and second degree murder by including reference to the elements of premeditation and deliberation, and that because of this, the defendant's conviction should be reversed. The information was drafted with greater specificity than provided for by statute. See MCLA 767.44; MSA 28.984; MCLA 767.71; MSA 28.1011. A citation to the statute defining first-degree murder, "MSA 28.548", is included on the face of the information. The information was not defective. *People v Strutenski*, 39 Mich App 72; 197 NW2d 296 (1972), *lv den*, 387 Mich 785 (1972).

IV

Arguing that the prosecution failed to prove premeditation and deliberation, defendant contends that the trial court erred by denying his motion for a directed verdict of not guilty as to first-degree murder. This contention cannot be accepted.

The question which is presented by a motion for a directed verdict of not guilty is whether there is evidence from which a jury can reasonably infer all of the elements of the crime charged. *People v Moore*, 51 Mich App 48; 214 NW2d 548 (1974); *People v Compton*, 23 Mich App 42; 178 NW2d 133 (1970). In determining whether or not there was sufficient evidence on each essential element of the [58 Mich App 384] offense of first-degree murder to submit the case to the jury, the state's evidence must be taken as true, and it must be viewed in the light most favorable to the state, so that the state benefits from every reasonable inference to be drawn therefrom. *People v Watkins*, 36 Mich App 380; 193 NW2d 914 (1971), *affirmed* 388 Mich 717; 202 NW2d 780 (1972). If there is any evidence at all on each of the elements of first-degree murder, the motion should be denied and the trial should proceed to allow the jury to decide whether or not the evidence is sufficient to establish guilt beyond a reasonable doubt. *People v Wesley Brown*, 35 Mich App 153; 192 NW2d 281 (1971), *lv den*, 386 Mich 768 (1971). The elements of premeditation and deliberation necessary to prove first-degree murder may be inferred from the character of the weapon used, the wound inflicted, and the circumstances surrounding the killing. *People v Lem Dumas*, 25 Mich App 173; 181 NW2d 89 (1970), *lv den*, 384 Mich 800 (1971); *People v Griner*, 30 Mich App 612; 186 NW2d 800 (1971); *People v Macklin*, 46 Mich App 297; 208 NW2d 62 (1973).

The evidence produced by the prosecution in the present case was more than adequate to permit the jury to find pre-

meditation and deliberation. An electrical cord was removed from a lamp, knotted on both ends, and wrapped a number of times around the decedent's neck. A wooden hanger was found near the body with indications that it had been used to apply added pressure to the cord. The cord was deeply embedded, breaking a bone in the neck and causing death by strangulation. The house was in dissarray and evidence of blood and hair was discovered indicating that a struggle had begun on the second floor ending in the first floor foyer where the severely beaten body was found. [58 Mich App 385] The trial court did not err in denying the motion for a directed verdict as to first-degree murder.

V

While attempting to impeach the defendant's credibility by examining him concerning prior convictions, the prosecutor asked the defendant if he had been convicted of embezzlement on April 16, 1970 in Wyoming, Michigan. Defendant denied the conviction, although his police record, which subsequently was determined to be incorrect, listed the offense along with many others. In an attempt to clarify the conviction under discussion, the prosecutor asked the defendant if he spent 30 days in jail as a result of it. At that time, the defendant replied that the conviction was for petty larceny, not embezzlement. On appeal, defendant's appellate counsel argues that the prosecutor's question constituted reversible error because it was asked in order to improperly reveal details of the prior conviction to the jury.

It is apparent that when considered in the context in which it occurred, the prosecutor's inadvertent error caused no prejudice to the defendant; and since no objection was made, we find no reversible error. *People v Peay,* 37 Mich App 414; 195 NW2d 75 (1971), *lv den.,* 388 Mich 795 (1972).

VI

Of the many photographs taken by the police at the scene of the murder, two were admitted into evidence over defendant's objection. On appeal, defendant maintains that they served no purpose other than to inflame the jury, and that the trial court committed reversible error by allowing their admission.

[58 Mich App 386] Resolution of this issue requires application of the balancing test formulated in *People v Eddington*, 387 Mich 551; 198 NW2d 297 (1972), and restated in *People v Falkner*, 389 Mich 682; 209 NW2d 193 (1973). The court must determine whether the photographs were "substantially necessary or instructive to show material facts or conditions", or whether they were merely "calculated to excite passion and prejudice."

One of the photographs was taken from near the second floor of the house looking down the stairwell approximately where the decedent, according to the prosecutor's theory, fell to the foyer striking the banister with his head. The second photograph was taken from a position closer to the body. It depicted the technique used to effectuate the strangulation, including details of the looped and knotted lamp cord embedded in the neck, and the location of the wooden clothes hanger used, again according to the prosecutor's theory, to assist in the generation of the force necessary to cause the extensive damage to the internal structures of the decedent's neck. This photograph also illustrated the condition of the decedent's face which tended to establish that he had been severely beaten before he was killed, possibly elsewhere in the house, such as on the second floor where the prosecution argued the altercation began.

Therefore, the photographs were of substantial probative

value. They were material to proving premeditation and deliberation. *People v Fullwood,* 51 Mich App 476; 215 NW2d 594 (1974). While they are certainly not pleasant, there is no suggestion that they were offered out of any improper prosecutorial motive. *People v Banks,* 50 Mich App 622; 213 NW2d 817 (1973). The trial court carefully considered the arguments of the parties, and [58 Mich App 387] in a thoughtful detailed ruling extending over five pages of trial transcript, concluded that the photographs were admissible. Our consideration of this issue leads us to the same conclusion; "The admission of the photographs could not be said to be an abuse of the trial judge's discretion". *People v Eddington, supra,* 387 Mich 562. No limiting instruction was requested. Defendant cannot now assign as error the failure to give such an instruction restricting the purposes for which the jury could consider the photographs. CCR 1963, 516.2.

VII

During cross-examination of the defendant and during his closing argument to the jury, the prosecutor made certain comments which the defendant now argues were reversibly erroneous as expressing a personal belief in the defendant's guilt, and as disclosing facts not in evidence. The allegedly prejudicial remarks are extracted from various parts of the lengthy trial transcript, and reproduced in isolation from the context in which they occurred. We have considered the purportedly prejudicial utterances of the prosecutor as they appear in the trial transcript, and we note the conspicuous fact that not a single objection to any of these remarks was made at trial. As a result, the applicable well recognized rule precludes reversal of the defendant's conviction unless the prejudicial effect of the prosecutorial comments was so great that it could not have been cured by a timely objection and a cautionary instruction. *People v Giacalone,* 52 Mich App 428; 217 NW2d 444 (1974); *People v White,* 54 Mich App 342; 220 NW2d 789

(1974); *People v Plozai,* 50 Mich App 131; 212 NW2d 721 (1973). Our examination of these remarks leads us to conclude that their prejudicial impact was mini [58 Mich App 388] mal. Any potential prejudice was curable; any possible error is not reversible.

The prosecutor's comments which were probably the most egregious and which will serve to indicate the nature of the remarks here urged as error occurred with reference to the defendant's theory of the case. During his closing argument, the prosecutor referred to the defendant's account of how he came into possession of the decedent's car as a "cock-and-bull story", and stated "that the defendant, to put it bluntly, he's lying to you".

This Court has repeatedly declined to find reversible error where the prosecutor argued that the defendant was lying and no objection to this language was made at trial. *People v Pacely,* 51 Mich App 67; 214 NW2d 561 (1974); *People v Couch,* 49 Mich App 69; 211 NW2d 250 (1973), *lv den,* 391 Mich 755 (1973); *People v Cowell,* 44 Mich App 623; 205 NW2d 600 (1973). While the prosecutor could have conveyed the underlying idea to the jury in more prosaic terms and hence avoided any semblance of impropriety, the language that he chose to employ did not exceed permissible limits of prosecutorial responsibility.

VIII

One of the three persons in the park in Grand Rapids who were present when the defendant stated that he had killed a man and taken his car, presumably could not be located, and was not called as a witness by the prosecution. Arguing that this person, Gary Brown, also known at Tattoo Man, was a res gestae witness, defendant objects for the first time on appeal to the prosecutor's failure to indorse and call this witness.

Defendant is unable to cite any authority for his [58 Mich App 389] proposition that a person who hears a defendant admit committing a crime becomes a res gestae witness. In any event, the identity of the witness was well-known to the defendant long before trial but he did not move for the indorsement or production of the witness. Furthermore, the testimony of the witness would be merely cumulative in that two other persons in the park at that time did testify. Under these circumstances, failure to produce the witness was not reversible error. *People v Koehler,* 54 Mich App 624; 221 NW2d 398 (1974).

The two remaining issues raised by the defendant are inane, and merit no comment other than point out that the theory of felony murder has no application to the present case.

Affirmed.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GLENN CHARLES, Petitioner, vs. CHARLES ANDERSON, Warden, Respondent.	Civil Action No. 8-70976

MAGISTRATE'S RECOMMENDATION AND REPORT

I. **RECOMMENDATION.**

It is recommended that the petition for habeas corpus be denied.

II. REPORT.

Petitioner has heretofore been permitted to file in forma pauperis a petition for a writ of habeas corpus attacking a state court conviction under which he is being held as an inmate at Jackson prison.

Petitioner has been represented by counsel from the inception of these proceedings. His petition sets forth an allegation that there was a violation of his federal constitutional rights in connection with comment on post-arrest silence, *citing Doyle v. Ohio,* 426 U.S. 610 (1976), that there was prosecutorial misconduct in connection with an assertion by the prosecutor in his personal belief of guilt coupled with the prosecutor's informing the jury that the State had other evidence of petitioner's guilt, and lastly that there was an absence of evidence from which an inference of premeditation or deliberation could be drawn which should require that petitioner's conviction of first-degree murder be reduced to second-degree murder.

A response has been filed by the Attorney General and the transcripts of the trial proceedings lodged with this Court. Oral arguments on this case were heard by the undersigned on September 11, 1978.

As noted by counsel for both sides, the Michigan Court of Appeals in an extensive opinion reviewed the facts in petitioner's case and the allegations of error raised on appeal and in a comprehensive opinion affirmed the conviction (*See People v. Charles,* 58 Mich. App. 371 (1975)). In the opinion of the Court of Appeals, and in both briefs of counsel, there are extensive summarizations of the trial testimony in this case and except as necessary the facts of the case will not be repeated in this report.

A. **The Doyle Issue**

Counsel for petitioner argues that the prosecutor improperly cross-examined petitioner with regard to his post-arrest silence in this case. As noted in petitioner's brief, the prosecution's case for proving petitioner guilty of first-degree murder was based on circumstantial evidence centered around the admitted fact that petitioner was found in possession of the victim's car and personal effects and that petitioner had been in Ann Arbor at the time of the homicide (Petitioner's brief, page 1). As also noted in petitioner's brief, he himself had testified that he had gained possession of the decedent's car and found decedent's possessions in the car when he stole it from the bus station in Ann Arbor.

During the prosecution's case, a detective had testified that petitioner had told him shortly after his arrest that he had taken the car from the vicinity of Washtenaw and Hill Streets in Ann Arbor. The prosecutor cross-examined petitioner on the apparent inconsistency with respect to the location of the car that had been stolen. The cross-examination of petitioner relied upon to prove a violation of the Doyle standard is set forth in petitioner's brief at pages 2 and 3.

However, as noted in the Attorney General's brief, petitioner had made a statement to the detective after being read the full Miranda rights (Respondent's brief, pages 9-10) and the location of the car at the time it was taken by petitioner was an important circumstantial fact in the case.

As correctly set forth in the Attorney General's brief, the testimony of petitioner may fairly be summarized as follows:

> "Petitioner's attorney began his direct examination by eliciting from the Petitioner a litany of Petitioner's past criminal convictions ranging from petty larceny to carry-

ing a concealed weapon for which he was serving his sentence at the State Prison at Jackson, Michigan, when he escaped on July 22, 1971.

"The Petitioner testified that he had left the state prison farm at Jackson, where he was a trusty, on the morning of July 22, 1971, in order to go to Virginia to stop his wife from getting full custody of his son. (Trial pp 251-252) He hitchhiked a ride to Ann Arbor where he arrived about noon. (Trial p 253) Most of the time on Thursday and Friday afternoons he spent walking around the street festival in Ann Arbor. (Trial pp 253-254) He claimed that he stole the white Buick when he saw it at about 10:30 Saturday evening parked at Kelly's Tire Company adjoining the bus station in Ann Arbor with the door unlocked and the keys in the ignition. (Trial p 259) He testified that he took the Buick and headed for the expressway. (Trial p 259)

"Between Jackson and Kalamazoo he pulled into a bowling alley looking for something to eat. When he found it was closed he headed back toward the freeway. On the way he dumped from the car a bunch of magazines, some keys and other items. (Trial p 260) He then went to Grand Rapids by way of Kalamazoo where he stopped at a hotel on South Division Street. He claimed to have found a suitcase which contained, among other things, a box with approximately $100.00 in quarters and $15.00 or $16.00 in fifty cent pieces when he opened the trunk of the car to find a rag to wipe off his fingerprints. He said that he wiped the car down and checked into the hotel, at about 2:00 Sunday morning paying for the room with some of that money. (Trial p 261)

"He testified that when he went to the Veterans Park about 8:00 Sunday evening, he saw an old friend of his,

Tatoo Man, sitting on one of the benches with Ethel Skinner and Barbara Brott. (Trial p 262) He told them the car he was driving was hot. (Trial p 263) He denied having said the owner of the car was dead. (Trial p 277) He denied having said he had murdered a man in Ann Arbor. (Trial p 273)

"The Petitioner admitted that he could see Kelly's Tire Company from the window of the Washtenaw County Jail (Trial p 302-303) Petitioner admitted that he tried to wipe the fingerprints off the car because he intended to abandon the car since the police might be able to place him in the car through fingerprints. (Trial pp 321-322) The petitioner wiped the steering wheel, the mirror, the gearshift and the door handles of the car. (Trial p 349) Petitioner admitted that he was in Ann Arbor practically penniless on Saturday evening, July 24, 1971. (Trial pp 362-363)"

The treatment of this issue by the Michigan Court of Appeals, particularly that portion of the opinion set forth at respondent's brief pages 14-15, is, I suggest, an appropriate conclusion by the Court and clearly establishes that no violation of the Doyle standard occurred. As noted by the Court of Appeals, "Consideration of a slightly greater portion of the transcript of the prosecutor's cross-examination of the defendant discloses that the prosecutor was not referring to the defendant's exercise of his right to remain silent; rather he was asking the defendant why, if that version were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the street." (58 Mich App at 381)

As further noted by the Michigan Court of Appeals, "Any reference to the defendant's communicativeness at the time of his arrest went to show the inconsistency between de-

fendant's testimony at trial that he did not speak to Detective LeVanseler concerning the car, and his earlier statement to the detective that he took the car from the vicinity of Hill and Washtenaw Streets." (58 Mich App at 382)

The Michigan Court of Appeals concluded that the prosecuter's question was by no means an attempt to use defendant's silence as evidence of his guilt but that the question was designed to elicit information from the defendant concerning a prior statement which was inconsistent with testimony at trial and that there was no reasonable possibility that the passing remark of the prosecutor could have contributed to the defendant's conviction (58 Mich App at 382). In this context, the statement in the Attorney General's brief is also appropriate:

> "Seen against the factual panorama of the case, the prosecution's questioning was quite proper. The prosecution's evidence implicating the Petitioner went beyond his possession of the victim's car and personal effects in Grand Rapids and the fact that Petitioner had been in Ann Arbor at the time of the killing. Between 7:30 and 8:00 p.m. on the evening of Saturday, July 24, 1971, the deceased was last seen alive arriving at and entering his home with a white male wearing a black T-shirt. (Trial pp 221-223) The victime was killed during the succeeding few hours before delivery of the Ann Arbor News on the morning of Sunday, July 25, 1971, since that issue of the paper was found on the porch. (Trial pp 60-61, 214, 227-229, 240) On the evening of July 25, 1971 Petitioner was seen at a park in Grand Rapids wearing a black T-shirt. (Trial pp 175-177, 181). The Petitioner told a young woman who was with an old friend of his known as "Tattoo Man" that he had escaped from Jackson and hitchhiked a ride with a faggot whom he murdered

and whose car he took. (Trial pp 178, 262)" (Respondent's brief, pages 15-16).

I suggest therefore that there has been no violation of the *Doyle* standard shown to this Court and that the Court should adhere to the ruling it made on a similar issue in the case of *Dates v. Koehler,* Civil Action No. 7-71751.

B. **Prosecutorial Misconduct Issue**

Petitioner sets forth four separate assertions in support of his argument that the prosecuter in the case at bar was guilty of misconduct of a constitutional dimension. Petitioner accuses the prosecutor of repeatedly expressing a personal belief in guilt and of making statements about facts that were not introduced into evidence (Petitioner's brief, pages 10-14). In this aspect of the case, petitioner focuses upon the closing argument of counsel and has set forth the appropriate excerpts from that argument upon which he relies. Counsel also sets forth and relies upon a question put to petitioner by the prosecuting attorney during the course of cross-examination which counsel for petitioner argues was not later supported by any evidence (Petitioner's brief, page 13). Petitioner also criticizes another portion of cross-examination in which the prosecuting attorney appeared to make a factual statement in the course of asking a question and asserts that these factual assertions were never later proved by evidence (Petitioner's brief, page 14). Lastly, petitioner again returns to the prosecuter's final argument and sets forth a portion of a sentence which, he argues, implied to the jury that there was other damaging evidence against petitioner which had not been disclosed to the trial jury (Petitioner's brief, page 15).

I suggest that the several items brought forth by petitioner, when examined against the facts of the case, make it clear that there was no prosecutorial misconduct, at least of the

gross kind that calls for reversal of criminal conviction under the standard of *Donnelly v. Dechistoforo*, 416 U.S. 637 (1974). As noted in the Attorney General's brief, the portions of the prosecutor's final argument set forth on pages 11 and 12 of petitioner's brief are legitimate final argument.

The prosecutor, in acting as an advocate for the People of the State of Michigan, was entitled to state to the jury his view as to what the trial evidence appeared to show and to suggest a plausible summary that would tie in the various facets of the circumstantial evidence placed before the jury.

The prosecutor's comments with regard to the reactions or lack of reactions of the defendant during the course of his testimony are also appropriate in final argument. The jury had seen the defendant and had heard the defendant testify and could draw its own conclusions with regard to the correctness or incorrectness of the prosecutor's assertions about the reactions of the defendant as a witness.

The credibility of the defendant as a witness was an important issue and the prosecutor was entitled to state his case to the jury as to why the defendant should not be believed. The quotations set forth by counsel for petitioner amount to no more than permissible arguments on that score.

So too, the question asked of petitioner by the prosecutor "You had your clothes off, sir, isn't that right?" set forth on page 13 of petitioner's brief, does not appear to be an incident calling for reversal on federal constitutional grounds of petitioner's conviction. A review of the case indicates that the prosecutor had developed a plausible theory regarding the manner in which the crime occurred and that this theory was that petitioner and the deceased had become acquainted because of the deceased's homosexual tendencies. In this context it was therefore appropriate to question petitioner regarding this possibility.

The particular question complained of was, of course, a rather dramatic manner in which to cross-examine. But in light of petitioner's denial of any contact with the deceased and in light of other evidence in the case indicating that petitioner had admitted to a friend that he had killed a faggot, I suggest that the prosecutor was not going beyond the bounds of proper cross-examination in asking the particular question complained of.

With regard to the questions set froth on page 14 of petitioner's brief in which the prosecutor asked petitioner whether it would surprise him to know that the Probation Department was on the sixth floor of City Hall, and whether it would surprise him to know that there are no female probation officers or employees over at City Hall, while it would no doubt have been appropriate for counsel to later prove by independent evidence the fact of his assertion, I suggest that these questions should not lead to a conclusion that petitioner's constitutional rights in the conduct of the state court trial were violated.

Since the factual assertions contained in the questions do not directly relate to issues of guilt or innocence, I suggest that the Michigan court could appropriately consider that any error committed had been harmless and should not lead to reversal. I suggest further that this assessment of the issue by the Michigan appellate court should not be second-guessed by this court, which is to consider only trial errors rising to a constitutional level.

Petitioner also asserts that the prosecutor's question on cross-examination regarding the nature of a particular offense which apparently had not been mentioned under direct examination when petitioner admitted to a number of offenses in his past record, should similarly not lead this Court to conclude that petitioner's rights were violated.

In view of the extensive admissions of prior convictions disclosed by petitioner himself on direct examination by trial counsel, the incident complained of appears to be *de minimis*.

So too, petitioner's complaint that it was not necessary for the trial jury to have before it two photographs of the deceased which are characterized as gruesome, should not lead this Court to grant habeas relief. This kind of question is concededly a matter of discretion for a trial judge to exercise. Since the evidence is admittedly relevant to the issues to be tried, even were this Court to disagree with the decision of the trial judge in admitting the photographs as exhibits, this disagreement would be over a matter of discretion and, I suggest, not a matter involving constitutional rights. I suggest that this is particularly the case since petitioner also argues to this Court as he did to the Michigan court that there was insufficient evidence to prove first-degree murder and that a conviction for that charge should be reduced to second-degree murder. I submit that the photographs might properly be some evidence regarding the nature of the homicide and might therefore appropriately be relevant on the issue raised by petitioner regarding the proofs showing of failing to show a sufficient basis from which a jury could conclude that petitioner was guilty of first-degree murder.

As noted, petitioner's last issue is an attack on the sufficiency of the evidence to prove first-degree murder as distinct from second-degree murder. I suggest that the cases cited by the Attorney General at page 25 of his brief are appropriate authority upon which this Court may deny the petition with respect to this issue. In addition, the factual argument set forth in respondent's brief at pages 25 through 27 appropriately shows that there was a basis from which the jury could conclude that the additional element needed to raise the charge of murder to first-degree murder had been proven.

As set forth in the Attorney General's brief, there was testimony from witnesses regarding petitioner's conversations with persons after the fact regarding how long it took to strangle a person (Respondent's brief, page 27).

I suggest that petitioner has not shown that he is entitled to relief on this or any other issue presented. Accordingly, as noted at the outset, I recommend that the petition for writ of habeas corpus be denied.

Respectfully submitted,

Paul J. Komives /s/
United States Magistrate

Dated: Nov. 16, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GLENN CHARLES, Petitioner, vs. CHARLES ANDERSON, Warden, Respondent.	CIVIL NO. 8-70976

JUDGMENT

The Court having entered an Order of Dismissal on this date based upon its review of the file and upon the report and recommendations of the Magistrate in accordance with 28 U.S.C. 636(b)(1)(C) and having ordered that Judgment enter for Respondent;

IT IS ADJUDGED that Petitioner be granted no relief and that the action be dismissed in accordance with the order entered this date.

DATED: Dec. 28, 1978

[s/ James P. Churchill]
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GLENN CHARLES, Petitioner, vs. CHARLES ANDERSON, Warden, Respondent.	CIVIL NO. 8-70976

ORDER OF DISMISSAL

The Court has reviewed the file and the Magistrate's Report and Recommendation in accordance with 28 U.S.C. 636(b)(1)(C). The Report and Recommendation of the Magistrate is hereby accepted and entered as the Findings and Conclusions of the Court.

IT IS ORDERED that petition for a writ of habeas corpus is hereby DENIED.

LET JUDGMENT ENTER ACCORDINGLY.

IT IS FURTHER ORDERED that the Clerk serve a copy of this Order by United States mail on counsel for Petitioner and on counsel for Respondent.

DATED: Dec. 28, 1978.

[s/ James P. Churchill]
United States District Judge

[610 F2d 417]

Glenn CHARLES, Petitioner-Appellant,

v.

Charles ANDERSON, Warden,
Respondent-Appellee.

No. 79-1158.
United States Court of Appeals,
Sixth Circuit.

Argued Oct. 8, 1979.

Decided Dec. 4, 1979.

As Amended Dec. 14, 1979.

Rehearing Denied Jan. 22, 1980.

F. Martin Tieber, Deputy State Appellate Defender, Lansing, Mich., for petitioner-appellant.

Frank J. Kelley, Atty. Gen. of Michigan, Robert A. Derengoski, Sol. Gen., Thomas L. Casey, Stephen F. Schuesler, Asst. Attys. Gen., Lansing, Mich., for respondent appellee.

Before EDWARDS, Chief Judge, MERRITT, Circuit Judge, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge.

The appeal in this habeas corpus case presents the question whether a murder defendant who, shortly after his arrest and after receiving *Miranda* warnings, offered an exculpatory story that is inconsistent with the story he told at trial, he may be cross-examined about his post-arrest failure to assert his trial version of the story. On the authority of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976), we hold that he may not.

I

Petitioner-appellant Glenn Charles was found guilty on October 9, 1972, of the first degree murder of Theodore Ziefle by strangling him with an electrical cord. The Circuit Court of Washtenaw County, Michigan, sentenced Charles to mandatory life imprisonment following a jury verdict of guilty. There were no witnesses to the crime. The only evidence linking Charles to the murder [610 F2d 419] was his possession of Ziefle's car and certain personal possessions; the fact that Charles owned a black T-shirt similar to that worn by a man in whose company Ziefle was last seen alive; and Charles' alleged statements to witnesses in Grand Rapids, Michigan, that he had murdered a man in Ann Arbor, that it would take about three minutes to strangle a person, and that his hands were deadly weapons.

The State's theory of the case was that Charles, an escaped trusty of the State prison farm in Jackson, Michigan, was hitchhiking when Ziefle gave him a ride, that Ziefle brought Charles to his home for the purpose of engaging in homosexual actvivty and that Charles murdered Ziefle to obtain his car and valuables.

Charles testified that he found the car parked behind Kelly's

Tire Company in Ann Arbor with the keys in the ignition and stole it to evade prison authorities. He said that he found the valuables, some silver coins, and an old camera, in the trunk of the car when he was looking for a rag with which to wipe off his fingerprints. He admitted driving to Grand Rapids and telling witnesses there that the car was stolen but denied telling them he had killed its owner.

On his cross-examination, the following colloquy occurred;

Q. Now, this Kelly's Tire Company, that's right next to the bus station, isn't it?

A. That's correct.

Q. And, the bus station and Kelly's Tire are right next to the Washtenaw County Jail are they not?

A. They are.

Q. And, when you're standing in the Washtenaw County Jail looking out the window you can look right out and see the bus station and Kelly's Tire, can you not?

A. That's correct.

Q. So, you've had plenty of opportunity from—well, first you spent some time in the Washtenaw County Jail, haven't you?

A. Quite a bit.

Q. And, you have had plenty of opportunity to look out that window and see the bus station and Kelly's tire?

A. That's right.

Q. And, you've seen cars being parked there, isn't that right?

A. That's correct.

Q. Is this where you got the idea to come up with the story that you took a car from that location?

A. No, the reason I came up with that is because it's the truth.

Q. It's the truth?

A. That's right.

Q. Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?

A. No, I don't.

Q. You don't think that's odd?

A. I wasn't charged with auto theft, I was charged with murder.

Q. Didn't you think at the time you were arrested that possibly the car would have something to do with the charge of murder?

A. When I tried to talk to my attorney they wouldn't let me see him and after that he just said to keep quiet.

Q. This is a rather recent fabrication of yours isn't it not? [sic]

A. No, it isn't.

Q. Well, you told Detective LeVanseler back when you were first arrested, you stole the car back on Washtenaw and Hill Street?

A. Never spoke with Detective LeVanseler.

Q. Never did?

A. Right, except when Detective Hall and Price were there and then it was on tape.

Charles appealed his conviction to the Michigan Court of Appeals. He argued that the prosecutor committed reversible constitutional error by using Charles' post-arrest silence to impeach the exculpatory story he told at trial. The court accepted the State's argument that the prosecutor's questions merely pointed out Charles' prior [610 F2d 419] inconsistent statement and did not use his post-arrest silence for impeachment purposes. Accordingly, it affirmed Charles' conviction. *People v. Charles,* 58 Mich.App. 371, 227 N.W.2d 348 (1975). The Michigan Supreme Court denied leave to appeal.

Charles then petitioned the district court for a writ of habeas corpus, raising the same issues the Michigan courts had rejected. The district court dismissed the petition on December 28, 1978, and this appeal followed.

II

Charles argues that the prosecutor's cross-examination amounted to an inquiry into his post-arrest silence. Although Charles' trial counsel apparently did not object to the prosecutor's cross-examination, the State does not argue that the error was not preserved for appeal. Both the Michigan Court of Appeals and the district court seem to have assumed that the issue could be raised for the first time on appeal. This was clearly correct in the present situation. Michigan appellate courts have held repeatedly that the failure to object at trial does not foreclose them from considering alleged constitutional violations. *See People v. Cotton,* 38 Mich.App. 763, 197 N.W.2d 90 (1972); *People v. Schumacher,* 29 Mich.App 594, 185 N.W.2d 633 (1971); *People v. Limon,* 4 Mich.App. 440, 145 N.W.2d 287 (1966). Furthermore, this court has found constitu-

tional error in impeachment by post-arrest silence even though the defendant did not object at trial. *See Rachel v. Bordenkircher*, 590 F.2d 200, 203 (6th Cir. 1978); *Minor v. Black*, 527 F.2d 1, 4-5 (6th Cir. 1975), *cert denied*, 427 U.S. 904, 96 S.Ct. 3189, 49 L.Ed.2d 1198 (1976). Thus, the constitutional issue is properly before us.

This case, Charles says, is controlled by *Doyle v. Ohio*, 426 U.S. 610, 619 96 S.Ct 2240, 2245, 49 L.Ed.2d 91 (1976), where the Supreme Court held "that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment."

In *Doyle*, two criminal defendants testified at their trial to an exculpatory story they had not previously offered. Over their counsel's objection, the prosecutor cross-examined them about why, if the exculpatory story were true, they had not offered it to the arresting officers after receiving *Miranda* warnings. The Supreme Court held that this use of their post-arrest silence violated due process:

> Despite the importance of cross-examination, we have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by [the *Miranda* decision], as a prophylactic means of safeguarding Fifth Amendment rights, see *Michigan v. Tucker*, 417 U.S. 433, 443-444, [94 S.Ct. 2357, 2363-2364, 41 L.Ed.2d 182] (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more that the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is re-

> quired to advise the person arrested. See *United States v. Hale, supra,* [422 U.S. 171] at 177 [95 S.Ct. 2133, 45 L.Ed.2d 99] Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. (Footnotes omitted.) 426 U.S. at 617-18, 96 S.Ct. at 2244, 2245.

The Attorney General of Michigan argues that *Doyle* does not control this case because the prosecutor's question "merely went to show the inconsistency between Petitioner's testimony that he stole the car [610 F2d 420] from the tire store and his earlier statement to the detective that he took the car from the vicinity of Hill and Washtenaw Streets." Unlike the *Doyle* petitioners, the State argues, Charles did not remain silent after receiving the *Miranda* warnings, but rather offered an exculpatory explanation which differed from that he gave at trial. The prosecutor's questions, the State says, were merely a legitimate attempt to explore this inconsistency.[1]

The question we must address is whether a defendant who has made a post-arrest statement inconsistent with his exculpatory trial testimony may be cross-examined not only about his prior inconsistent statement but also about his post-arrest failure to tell the arresting offices the exculpatory story he told at his trial. For the reasons hereinafter set forth, we hold that he may not, and, accordingly, reverse.

---

[1]

Although Charles claims that he never made the inconsistent post-arrest statement, the jury's guilty verdict requires us to accept as fact that he did.

III

We begin with the proposition that *Doyle* does not prohibit every impeachment use of a defendant's post-arrest silence, but only those which are fundamentally unfair. For example, the *Doyle* court recognized:

> [T]he fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. (Citations omitted.) 426 U.S. at 619-20, n. 11, 96 S.Ct. at 2245, n. 11.

See United States v. Conlin, 551 F.2d 534 (2d Cir.), *cert. denied,* 434 U.S. 831, 98 S.Ct. 114, 54 L.Ed.2d 91 (1977). Other circuits have held that the prosecutor can cross-examine the defendant about his post-arrest silence in order to rebut the inference his testimony has created that he cooperated with the police. *See United States v. Vega,* 589 F.2d 1147 (2d Cir. 1978); *Stone v. Estelle,* 556 F.2d 1242 (5th Cir. 1977), *cert. denied,* 434 U.S. 1019, 98 S.Ct. 742, 54 L.Ed.2d 767 (1978); *United States v. Fairchild,* 505 F.2d 1378 (5th Cir. 1975).

On the other hand, *Doyle* teaches that the defendant's silence after he has received *Miranda* warnings may not be used to impeach his exculpatory trial testimony. Because the defendant's silence "may be nothing more than the arrestee's exercise of these *Miranda* rights," *Doyle v. Ohio* 426 U.S. 610, 617, 96 S.Ct. 2240, 2244, 49 L.Ed.2d 96 (1976), it is not necessarily inconsistent with his exculpatory testimony. Rather, the defendant's post-arrest silence is "insolubly ambiguous" and its use to impeach exculpatory trial testimony denies due process. 426 U.S. at 617, 96 S.Ct. 2240.

By contrast, there is nothing ambiguous about the defendant's silence when it is offered to rebut the inference that he cooperated with the arresting officers or told them the same story he told the jury at trial. In that situation, the fact of his silence, and not the reasons for it, is important. Consequently, using the fact that he remained silent is constitutionally permissible under those circumstances.

Moreover, permissible cross-examination about post-arrest silence serves a different purpose from that of impermissible cross-examination. Where the defendant has raised an inference that he told arresting officers the same story he told the jury, the prosecutor's cross-examination about the defendant's post-arrest silence is designed to impeach the defendant's credibility, not the exculpatory story itself. By pointing out the inconsistency, the prosecutor seeks to show the jury that the defendant lied when he testified that he had told the same exculpatory story to arresting officers. In that situation the fact of post-arrest silence is not offered to impeach the substance of the exculpatory story, but only to impeach the credibility of the defendant.

In the *Doyle* situation, however, the defendant's post-arrest silence is offered to [610 F2d 421] impeach the substance of his exculpatory trial testimony. The inference the prosecutor wishes the jury to draw is that, if the exculpatory story were true, the defendant would have offered it to police immediately after being arrested; since he did not, the story must be false. As the Court recognized in *Doyle*, recent fabrication is only one of several possible explanations for the defendant's post-arrest silence. Since it is the meaning of the silence that is important and since that meaning is ambiguous, due process prohibits the use of post-arrest silence to impeach exculpatory trial testimony. *Doyle* v. *Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

[1] Applying this distinction to the present case, we hold that the prosecutor's cross-examination violated due process. The prosecutor's questions dealt with two separate issues and raised two separate inferences, one permissible and the other impermissible.

The latter portion of the above quoted cross-examination concerned Charles' prior inconsistent statement that he had stolen Ziefle's car from the vicinity of Washtenaw and Hill streets in Ann Arbor, Michigan. This statement was important because of the fact that Charles had made it. It showed that he had lied, either to the arresting officers or to the jury, and that fact made his trial testimony less worthy of belief. In short, the prior inconsistent statement bore on Charles' credibility, not the truth of his exculpatory story. As such, cross-examination about it was permissible.

However, the earlier portion of the exchange concerned Charles' failure to tell arresting officers the same story he told the jury. The prosecutor sought to use that failure to impeach Charles' exculpatory trial testimony directly by raising the impermissible inference that if the story had been true, Charles would have offered it at the time he was arrested.

> Q. Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?
>
> A. No, I don't.
>
> Q. You don't think that's odd?
>
> A. I wasn't charged with auto theft, I was charged with murder.
>
> Q. Didn't you think at the time you were arrested that possibly the car would have something to do with the charge of murder?

A. When I tried to talk to my attorney they wouldn't let me see him and after that he just said to keep quiet.

Q. This is a rather recent fabrication of yours isn't it not? [sic]

Here, as in the *Doyle* situation, recent fabrication is only one possible explanation as to why Charles did not tell the arresting officers the story he told the jury. It is not impossible, for example, that Charles lied to Detective LaVanseler when first questioned, then realized that he was in enough trouble already and had better remain silent until he consulted an attorney. The Supreme Court made clear in *Miranda* v. *Arizona*, 384 U.S. 436, 473-74, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966), that a criminal defendant may assert his self-incrimination privilege at any point during an interrogation.

In any event, Charles' post-arrest failure to tell the same story he told at trial is not necessarily inconsistent with his exculpatory trial testimony. Rather, it is "insolubly ambiguous" (426 U.S. at 617, 96 S.Ct. 2240), and we hold that its use as a vehicle for impeachment violated due process.

The State relies upon three decisions from the Fifth, Eighth and Tenth Circuits which, it says, hold that the *Doyle* rule does not apply where the defendant makes a post-arrest statement inconsistent with his exculpatory trial testimony. However, in *United States* v. *Mireles*, 570 F.2d 1287, 1293 (5th Cir. 1978), the questions asked by the prosecutor were merely an effort to impeach by prior inconsistent statements, and "defendant's silence was in no way at issue." In *Twyman v. Oklahoma*, 560 F.2d 422, 424 (10th Cir. 1977), *cert. denied*, 434 U.S. 1071, 98 S.Ct. 1254, 55 L.Ed.2d 774 (1978), the defendant, after receiving the *Miranda* warnings, gave an FBI agent a [610 F2d 422] detailed account of his recent activities, including his association with the murder victim; this permitted

the prosecution to question a crucial omission. In *United States* v. *Mitchell*, 558 F.2d 1332, 1335 (8th Cir. 1977), the defendant signed a written waiver of his *Miranda* rights, told police an exculpatory story and failed to elaborate when the police were unable to verify it. The opinions in those cases did not address the distinction between using post-arrest silence to impeach a defendant's credibility and using it to impeach the substance of his exculpatory story. They do not stand for the proposition that *Doyle* is inapplicable simply because a defendant has made an inconsistent statement.

We recognize that, in particular cases, the line of demarcation between permissible and impermissible cross-examination may be difficult to discern. As Judge Merritt's dissent aptly observed: "In the heat of cross-examination . . ., questions and answers are often unclear." Out of an abundance of precaution, the only safe procedure for the prosecution to follow in a potential *Doyle* situation is simply not to question a defendant about his post-arrest silence.

IV

[2] Our holding that the prosecutor's questions about Charles' post-arrest failure to tell officers the same story he told the jury violated due process is not the end of our inquiry. In *Doyle*, the Supreme Court left open the possibility that such a constitutional error can be harmless beyond a reasonable doubt. *See Doyle v .Ohio;* 426 U.S. 610, 619-20, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1976). This and other courts have held that *Doyle* violations may be harmless and not require reversal. *See Hayton v. Egeler*, 555 F.2d 599 (6th Cir.), *cert. denied*, 434 U.S. 973, 98 S.Ct. 527, 54 L.Ed.2d 463 (1977); *Meeks v. Havener*, 545 F.2d 9 (6th Cir. 1976), *cert denied*, 433 U.S. 911, 97 S.Ct. 2980, 53 L.Ed.2d 1096 (1977); *Bradford v. Stone*, 594 F.2d 1294 (9th Cir. 1979); *Chapman v.*

United States, 547 F.2d 1240 (5th Cir.), *cert. denied*, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393 (1977). Consequently, we must determine whether the error in Charles' case was harmless.

In *Minor* v. *Black*, 527 F.2d 1 (6th Cir. 1975), *cert. denied*, 427 U.S. 904, 96 S.Ct. 3189, 49 L.Ed.2d 1198 (1976), a case which anticipated the Supreme Court's holding in *Doyle*, this court enunciated the standard for determining whether the prosecutor's error in using the defendant's post-arrest silence to impeach his exculpatory trial testimony is harmless.

> [T]o find harmlessness beyond a reasonable doubt we would have to conclude that, absent the cross-examination and closing argument, "no juror could have entertained a reasonable doubt" as to petitioner's guilt. 527 F.2d at 5.

In a related context, this court recently noted:

> Harmless error, in the context of a violation of a constitutional right of a defendant, is an extremely narrow standard, permitting the State to avoid the retrial of a defendant only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant.
>
> * * * * * *
>
> [H]arm is presumed to have flowed from constitutional error; the burden is on the State to demonstrate conclusively to the contrary. It is not enough for the reviewing court to feel that the evidence is strong and that the defendant probably would have been convicted anyway. That is a decision for the jury to make, unaffected by improper argument or impermissible inferences urged by the prosecutor. *Eberhardt v. Bordenkircher*, 605 F.2d 275, at 278-279 (6th Cir. 1979).

Applying this standard to the present case, we cannot find that the prosecutor's error was harmless. The State's evidence was entirely circumstantial and not overwhelming. The case against Charles consisted of his possession of Ziefle's car and valuables, his alleged statements to witnesses in Grand Rapids that he had killed a man [610 F2d 423] in Ann Arbor and the fact that he owned a black T-shirt similar to one Ziefle's last known companion was seen wearing. However, the Grand Rapids witnesses were arrested initially with Charles and were held overnight in connection with the murder; their testimony was self-serving and hardly above suspicion. Nor was Charles' black T-shirt particularly strong evidence of his guilt. Finally, Charles trial testimony, if believed, explained his possession of Ziefle's car and valuables, which we view as the strongest evidence linking him to the murder.

Although this evidence might well have been enough to convict Charles, even absent the prosecutor's improper questioning, we hold that the State has not carried its heavy burden of showing that, disregarding the cross-examination, no juror could have entertained a reasonable doubt as to Charles' guilt. Under these circumstances, we cannot find harmless error.

Accordingly, the judgment is reversed and the case remanded to the district court with directions to issue a writ of habeas corpus unless Charles is tried again in the State court within a reasonable time.

Reversed and remanded.

MERRITT, Circuit Judge, dissenting.

I agree with the Court that the essential question is whether the record in this state court murder case creates a serious risk that the defendant was jailed for silence in violation of the

fifth amendment. But in its admirable effort to ensure fairness, the Court has found a risk where, in my judgment, no significant risk exists. I read differently the meaning and effect on the jury of the prosecutor's questions to the defendant on cross-examination.

The murder victim's stolen car in defendant's possession at the time of his arrest was a key piece of evidence linking the defendant with the murder. Taken in context, the state prosecutor's question to the defendant—isn't it "odd that you" did not "come forward [with your present story about the location of the car] at the time you were arrested"—does not overstep permissible fifth amendment bounds. Defense counsel did not object to the question at the time. From a reading of the transcript of the trial, it is clear to me that the prosecutory was asking about the conflict between the defendant's story at trial (that he stole the car at the bus station) and his story to the police detective shortly after his arrest (that he stole it at another location). Assuming that the detective truthfully recited the defendant's story at the time of arrest, as we must in view of the jury's verdict, the conflict indicated the defendant was lying.

Just before the trial recessed for lunch, the police detective was examined and cross-examined closely about the story about the car the defendant had told after his arrest. The detective's testimony was still fresh in the jury's mind immediately after lunch when the defendant took the stand and told a different story about where he got the car. When the time came for the prosecutor to cross-examine the defendant, it was natural, indeed necessary, for the prosecutor to ask about the clear conflict in the two stories. After reminding the defendant of his testimony on direct about the location of the stolen car, the prosecutor asked: "Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?" This

question could have been phrased better because it is unclear. It does not directly allude to the conflict in the story the defendant told at trial and the story he told the detective. The question received an evasive answer, "I wasn't charged with auto theft, I was charged with murder." But the prosecutor then tied the question down clearly to the prior inconsistent statement:

> Q: This is a rather recent fabrication of yours isn't it not [sic]?
>
> A: No, it isn't.
>
> Q: Well, you told detective LeVanseler back when you were first arrested, you stole the car back on Washtenaw and Hill street?
>
> A. Never spoke with Detective LeVanseler.

[610 F2d 424]

We are dealing here with impeachment on cross-examination of a hostile witness. On the subject in question, the location of the stolen car, the defendant never stood mute in the face of accusations or claimed his privilege. He never invoked his constitutional privilege to remain silent. In fact, he did not remain silent at all when interrogated after his arrest or at trial. He gave two stories which were graphically inconsistent. There was no silence for him to rely on or for the prosecutor to ask about. Since there was, in fact, no silence at any time concerning the location of the car, I do not think it plausible to say silence, rather than the prior inconsistent statement, is what the prosecutor was asking about.

On the other hand, in *Doyle v. Ohio*, the main precedent cited by the Court for its position, the defendant made no statement at the time of his arrest but instead, invoking his fifth amendment privilege, remained silent then and also at

a later preliminary hearing. Repeatedly on cross-examination, the prosecutor in *Doyle* asserted a conflict between the defendant's story at trial and his pretrial invocations of the privilege. Nothing in the majority opinion in *Doyle*, or in Justice Stevens' opinion for three members of the Court, suggests that the Court would find any admissibility problem had the defendant instead made an inconsistent statement at the time of arrest or at the preliminary hearing.

In the heat of cross-examination of a hostile and evasive witness in a criminal trial, questions and answers are often unclear. But the ambiguity of the prosecutor's initial question was quickly cleared up by the next series of questions which focused on the inconsistency between the defendant's trial testimony on direct examination and a prior statement given after his arrest.

Molded by the courage of Sir Thomas More, the fifth amendment's great protection of individual dignity assures the accused that he will not be forced to speak or jailed for silence. Fulfillment of this same high purpose suggests that silence is not required in the face of accusation and law officers are not obliged to disregard the words of the accused when he chooses to explain.

No. 79-1158

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GLENN CHARLES, Petitioner-Appellant, v. CHARLES ANDERSON, Warden, Respondent-Appellee.	

ORDER DENYING PETITION FOR REHEARING

Before EDWARDS, Chief Judge, MERRITT, Circuit Judge, and PHILLIPS, Senior Circuit Judge.

No judge of the court in regular active service having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied. Judge Merritt would grant the petition for rehearing for the reasons stated in his dissenting opinion filed December 4, 1979.

Entered by order of the court.

[s/ John P. Hehman]
CLERK